

Revision: HCFA-PM-91-9 (MB)
October 1991

ATTACHMENT 4.34-A
Page 1
OMB No.:

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory: Missouri

REQUIREMENTS FOR ADVANCE DIRECTIVES UNDER STATE PLANS FOR
MEDICAL ASSISTANCE

The attached Missouri Medicaid Bulletin, Volume 13, No. 7 dated November 27, 1991 is a written description of Missouri's Advanced Health Care Directive statute. Also included is a synopsis of Missouri Case law. This law also provides for the refusal by a physician, nurse or other health care provider or employee where the instruction of the Attorney in Fact is contrary to the individuals religious or sincerely held moral convictions. It also provides for a health care facility's right of refusal on the same grounds. The bulletin provides a list of resources for additional information.

TN No. 91-53
Supersedes _____ Approval Date JAN 21 1992 Effective Date 12-1-1991
TN No. N/A

HCFA ID: 7982E

SPECIAL BULLETIN FOR NURSING HOME,
HOME HEALTH, HOSPITAL, HOSPICE, AND
PERSONAL CARE PROVIDERS

Vol. 13, No. 7
November 27, 1991

Missouri MEDICAID Bulletin

MISSOURI ADVANCED HEALTH CARE DIRECTIVE

OBRA 90, section 4715(a)(1)(58), requires each State develop a written description of the law of the State concerning advance directives. This description is to be distributed to providers by the state Medicaid agency. The following is the description.

Missouri laws are contained in two chapters of its statutes. Chapter 459 RSMo 1986 titled "Declarations, Life Support". This chapter was enacted in 1985. Our review of this chapter indicates its subject is the withholding or withdrawing of death prolonging procedures.

The recent legislation is contained in conference committee Senate Bill No. 148, 86th General Assembly, and is much broader in concept, and if properly completed, we believe will take precedence over chapter 459.

HISTORY AND THE LAWS

The Senate Bill, passed and signed by the Governor repealed section 404.710 RSMo, Supplement 1990, and enacted seventeen new sections. These sections are found in chapter 404, beginning with reenacted section 404.710 and sections 404.800 through 404.865. One new section was also added and it is contained in 404.870.

A Durable Power of Attorney is a written document that appoints a person, "Attorney in Fact", to act for the person creating the Power of Attorney. The use of the term "Durable" means the delegated powers do not terminate if the principal becomes disabled or incapacitated.

Sections 404.800 to 404.865 specifically authorize a Durable Power of Attorney for Health Care. The Power of Attorney to be durable must contain the word "Durable" in the caption.

To create a Durable Power of Attorney, the following language must be used: "This is a Durable Power of Attorney and the authority of my Attorney in Fact shall not terminate if I become disabled or incapacitated."

State Plan TN# 91-53
Supersedes TN# N/A

Effective Date 12-1-1991
Approval Date 12-1-1991

Section 404.710.4 limits Power of the Attorneys In Fact by requiring each of the ten (10) powers listed to be specifically enumerated in the Durable Power of Attorney.

The statute says no Power of Attorney shall grant to the Attorney in Fact authority to carry out one of the ten actions unless expressly enumerated in the Power of Attorney. Health Care Power of Attorney is included in this class. The consent or prohibiting the Attorney in Fact includes: "Any type of health care, medical care, treatment or procedure to the extent authorized by sections 404.800 to 404.865."

Missouri's Durable Power of Attorney for Health Care begins with section 404.800 RSMo and ends with 404.865. We suggest a copy be obtained from the attorney who normally represents you.

The first section contains definitions. They are as follows:

- (1) "Certification", a written instrument or a written entry in a medical record;
- (2) "Incapacitated", a person who is unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that he lacks capacity to meet essential requirements for food, clothing, shelter, safety or other care such that serious physical injury, illness or disease is likely to occur;
- (3) "Patient", the principal of a Durable Power of Attorney for Health Care under sections 404.800 to 404.865.

Additional definitions that apply are contained in Appendix 1.

Several sections and subsections of the General Power of Attorney Act are incorporated in the Health Care Act. They are:

Duties of the Attorney in Fact -- see 404.714 RSMo Supp 1989.

Section 404.810 refers to a number of sections and incorporates those sections into the Durable Power of Attorney for Health Care.

Section 404.705 is one of these. Subsection 1(3) requires the Durable Power of Attorney for Health Care be created in the same manner as the transfer of Real Estate. The Power of Attorney must be signed in front of a Notary Public with the proper certification included. Further, the Power of Attorney must be witnessed by two other persons.

Section 404.710 enumerates all the Powers of Attorney in Fact with a General Power of Attorney versus the Durable Power of Attorney for Health Care. This becomes increasingly important if the Health Care Power of Attorney includes matters not directly related to health care. Someone on each facility's staff should be aware of this difference so the Attorney in Fact can be made aware of this section.

Section 404.707.1 grants the power to appoint multiple Attorneys in Fact with specific areas in which to act. Again, the section speaks to a General Power of Attorney but applies to the health care directive.

Section 404.707.2 says persons can serve as an Attorney in Fact, except someone who has been disqualified from being a Guardian or Conservator under the probate code.

Section 404.714, speaking again primarily of a General Power of Attorney, sets out the duties of an Attorney in Fact. We believe this section is minimally involved where Health Care Power of Attorney is involved.

SPECIFIC REQUIREMENTS OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE

Attending physicians or employees of the physician, the operator or an employee of a health care facility where the principal is residing cannot be the Attorney in Fact, subject to two exceptions; i.e. the patient and attorney are related by blood or marriage in the second degree.

OR

The patient and Attorney in Fact are members of a group who are bound by religious vows and they conduct or assist in religious services and are regularly involved in religious benevolent, charitable, educational ministry, or the performance of health care services. See Section 404.815.

The patient has a right to determine what treatment will or will not be provided. If the patient desires to convey the power to withhold or withdraw artificially supplied nutrition or hydration, this authority must be specifically included in the Power of Attorney. However, this section does not require artificially supplied nutrition when the attending physician determines the patient cannot tolerate it (section 404.820.1.).

No Attorney in Fact may, with the intent of causing the death of the patient, authorize withdrawal of nutrition or hydration which may be ingested through natural means (section 404.820.2.).

The statute requires the Attorney in Fact decide what are appropriate measures considering the comfort of the patient (section 404.820.3.).

Before the withdrawal of nutrition and hydration from the patient, the physician must:

Attempt to explain to the patient the intent to withdraw and the consequences of the withdrawal and give the patient the option to refuse the withdrawal (section 404.820.4(1)).

OR

Certify in the patient's records/file the patient is comatose or consistently in a condition where it is impossible for the patient to understand the intent to withdraw and the consequences of the withdrawal (section 404.820.4(2)).

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Supersedes TN# N/A

Effective Date 12-1-1991

Approval Date JAN 23 1992

Section 404.822 mandates the Attorney in Fact to seek and consider information about the following in making medical decisions:

Patient's medical diagnosis, prognosis and the benefits and burdens to the patient.

Where withdrawal of treatment is involved which will allow a preexisting condition to run its course, the Attorney in Fact must again seek "evidence" of the medical diagnosis, prognosis and the benefit or burden of the treatment to the extent possible within prevailing medical standards.

The authority of the Attorney in Fact to make decisions for the patient begins with a physician certification of incapacity. This authority ceases when the physician certifies the incapacity no longer exists. The Durable Power of Attorney is not affected by this process, only the power to act by the Attorney in Fact is involved.

The statute requires certification by two licensed physicians. The last sentence says certification by one physician is required. Either of these complies with the law.

Section 404.830 subsection 1 provides for the refusal by a physician, nurse, or other health care provider or employee of the provider to comply with the decision of the Attorney in Fact when compliance is contrary to the individual's religious beliefs or sincerely held moral convictions.

Subsection 2 provides the same right of refusal to a hospital, nursing facility, residential care facility or other health care facility where the provision of the care is contrary to institutional policy that is based upon religious beliefs or sincerely held moral convictions. This refusal does not exist where the facility received a copy of the Durable Power of Attorney for Health Care prior to commencing the current treatment or confinement.

Subsection 3 of 404.830 prohibits the provider who has refused to provide the care from impeding the patient's transfer to another facility.

Section 404.835 states that it is unlawful for a physician, nurse, a health care provider or an employee of a health care facility, hospital, or nursing facility to require execution of a Durable Power of Attorney for Health Care as a condition to receiving care.

Section 404.835.1 makes it unlawful for a physician, nurse or other individual who is a provider or an employee of a provider to require an individual to execute a Durable Power of Attorney for Health Care as a condition of providing care or admission to a facility.

Section 404.835.2. Prohibition subsection 1 above applies to insurance companies transacting health insurance business in Missouri, non-profit care service plans, HMOs, or other similar person or entities who contract for or agree to provide medical care.

Section 404.840.1. The Durable Power of Attorney for Health Care shall be incorporated into the patient's medical record when the provider obtains information that it exists and prior to the provider taking any action decided upon by the Attorney in Fact.

Section 404.840.2. The Attorney in Fact has the same right to receive medical information regarding proposed health care and have access to and review of medical records. He/she has the same authority to consent to disclosure of medical information and records as the principal. Subject only to any limiting provisions of the Power of Attorney or any federal law.

Section 404.845.1. Nothing in the Durable Power of Attorney Act shall revoke, amend or limit the operation of Chapter 565 RSMo. This is the chapter covering "Crimes Against Persons".

Section 404.845.2. If a patient dies as the result of the withdrawing or withholding of life-sustaining treatment under the authority of the Power of Attorney, the principal's death will not constitute suicide or homicide. Also, the death will not impair or invalidate any insurance, annuity or other type of contract conditioned on the life or death of the principal.

Section 404.847. The provisions of the Durable Power for Health Care Act shall not invalidate any previously made Durable Power of Attorney which permits an Attorney in Fact to make health care decisions. Sections 404.710 to 404.820 of this act shall apply to the Durable Power of Attorney for Health Care executed prior to this act. However, if this initial Power of Attorney does not have specific instructions regarding nutrition and hydration, the Attorney in Fact and health care provider must comply with federal and state law. This requires a new Power of Attorney if the principal desires to include nutrition and hydration instructions in his/her instructions.

Section 404.850.1. Power of Attorney may be revoked at any time and in any manner by the principal. The principal can communicate the intent to revoke to the Attorney in Fact or the attending physician or health care provider.

Section 404.850.2 requires the attending physician or other health care provider to enter into the patient's record the fact of the revocation when they learn about it.

Section 404.850.3. Execution of another Power of Attorney for Health Care revokes all prior Powers of Attorney. The exception to this is if the second power provides otherwise.

Section 404.851 protects a person who relies and acts upon instructions of the Attorney in Fact who is exercising authority granted by the Power of Attorney from liability to the patient or the patient's successors in interest.

Section 404.865 prohibits the Attorney in Fact from delegating to another person health care decision-making powers unless the Power of Attorney explicitly authorizes the delegation.

Section 1 provides nothing in sections 404.710 to 404.865 shall be construed to allow discrimination against handicapped or disabled persons in their making of a Durable Power of Attorney for Health Care.

MISSOURI CASE LAW - CRUZAN V. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH

Facts surrounding this case: Nancy Cruzan was injured in an automobile accident and ultimately was admitted to a state facility for care. The court appointed guardian (her father) requested nutrition and hydration tubes be removed. The result from this action would be death. The director refused to remove the tubes.

The guardian petitioned the Probate Court where the guardianship was instituted for a court order instructing the Director to withdraw the hydration and artificial nutrition tube. The trial court heard evidence and decided the withdrawal would be in accord to the patient's wishes and entered the order. The Missouri Supreme Court did not agree and reversed the Probate Court's decision.

The matter then went to the U.S. Supreme Court. This court determined due process did not forbid a state from requiring "clear and convincing evidence" of the incompetent's wishes regarding withdrawal of these functions and, therefore, the State could use this standard. This was a five to four decision.

Justice O'Connor, of the majority, also said the due process clause protected a person's right to refuse medical treatment. Justice Scalia, also of the majority, in his concurring opinion said it was up to Missourians to decide through their elective officials whether an incompetent's wishes are to be complied with. The minority disagreed with the clear and convincing standard. Three judges stated, under the due process clause, Cruzan has the constitutional right to be free from unwanted artificial nutrition and hydration. The other dissenting Judge concurred. The decision established the constitutional right for a person to choose their medical care.

REQUIREMENTS OF OBRA 90

Medicaid providers, who receive Title XIX (Medicaid) payments, are subject to the OBRA requirements:

- (a) Hospitals;
- (b) Nursing Facilities;
- (c) Home Health Care providers;
- (d) Personal Care Service Providers;
- (e) Hospice Programs;
- (f) Health Maintenance Programs;

The above providers are required to:

- (1) Maintain written policies and procedures that apply to adult individuals receiving care;
- (2) Provide written information to each member for the group covered in (1) above which must include:
 - (a) The individual's rights under state law to make medical care decisions and the right to make an advanced health care directive (in Missouri, a Durable Power of Attorney for Health Care).
 - (b) The provider of care's written policies involving the implementation of the rights set out in (2)(a) above.
- (3) Document in the patient's record that a Health Care Directive has or has not been executed.
- (4) Provider cannot condition the provision of care based on the patient's executing or not executing a Health Care directive.
- (5) Ensure compliance with State law respecting Advanced Health Care Directives.
- (6) Nothing in (4) above requires care which conflicts with the directive.
- (7) The information in (2)(a) above will be provided to adult patients when:
 - (a) Hospitals - at time of admission as an inpatient*
 - (b) Nursing Facility - at the time of admission as a resident.
 - (c) Home Health Provider or Personal Care Provider - must be before provision of care.
 - (d) Hospice Program - upon the initial provision of care.
 - (e) HMO at the time of enrollment.
- (8) Provide training for the provider's staff on the Advanced Health Care Directive and education to the community.

ADDITIONAL REQUIREMENTS INCLUDED IN STATE PLAN (section 2200) - State Medicaid Manual. Department of Health and Human Services.

- (9) Admission of an incapacitated person. If the provider distributes information about its policies and procedures to the incapacitated person's family, surrogates or other concerned persons, all Advanced Health Care Directive information normally provided must also be given.

- (10) The provider must comply with a previously executed Advanced Health Care Directive when supplied by the patient, a relative, surrogate, or other concerned person. If the provider is not presented with an Advanced Health Care Directive, the facility must:

- (a) Note that the patient was not able to receive information;
- (b) Communicate whether a directive existed.

*(We have been told the proposed federal regulations may change with respect to hospitals.)

SOURCES FOR ADDITIONAL INFORMATION

Missouri Bar Association
326 Monroe
Jefferson City, MO
Phone: (314) 635-4128

AARP
P.O. Box 96869
Washington, D.C. 20049
Phone: (202) 434-2277

Mr. Charlie Sabatino
ABA Commission of Legal Problems
1800 M Street, N.W.
Washington, D.C. 20036
Phone: (202) 331-2297
(Questions, answers, instructions
and sample form)

National Health Lawyers Association
1620 Eye Street N.W., Suite 900
Washington, D.C. 20006
Phone: (202) 833-1100

Patient Self-Determination (publication)
Directory and Resource Guide
(Division of Medical Services' Counsel
has found this to be very helpful.)

Midwest Bioethics Center
410 Archibald, Suite 200
Kansas City, MO 64111
Phone: (816) 756-2713
Executive Director, Myra Christopher
(Numerous materials available. The
center has been at the forefront
of this subject.)

St. John's Mercy Medical Center
615 South New Ballas Road
St. Louis, MO 63141-8277
Telephone: (314) 569-6000
Attn: Mr. T.G. Hooyman Ph.D.
Director of Institutional Ethics
(Medical Services Counsel has reviewed
the hospital's information and believes
it to be appropriate for providers to
review.)

Legal Counsel for the Elderly
601 E. Street, N.W.
Washington, D.C. 20049
Telephone: (202) 434-2120
FAX: (202) 434-6464

DURABLE POWER OF ATTORNEY FORM

The Missouri Bar has a Durable Power of Attorney form available with instructions. If the form is needed, please contact them.

If you have a Durable Power of Attorney for Health Care form, you may send a copy of the form to the Division of Medical Services for review. The agency will review the form for compliance with the law. If the form complies, we will notify the facility in writing, as well as the survey agency of its compliance and usability.

The form may be mailed to:

Division Counsel
Missouri Division of Medical Services
P.O. Box 6500
Jefferson City, MO 65102

State Plan TN# 92-23

Effective Date July 1, 1992

Supersedes TN# 91-53

Approval Date July 1, 1992

Appendix 1

404.410. Definitions.--As used in sections 404.400 to 404.660, unless the context otherwise requires, the following terms shall mean:

- (1) "Adult", an individual who has attained the age of eighteen years, notwithstanding that an adult may be of a different age under sections 404.005 to 404.094, the Missouri transfers to minors law;
- (2) "Beneficiary", a person for whom property has been transferred to a personal custodian under sections 404.400 to 404.650 for the beneficiary's use and benefit;
- (3) "Benefit plan", any plan, contract, trust or account for the benefit of employees, partners, members of an organization or an individual, in which a person may designate a beneficiary for a plan benefit. The term "benefit plan" is also used to refer to the fiduciary administering the plan;
- (4) "Broker", a person lawfully engaged in the business of effecting transactions in securities or commodities for the broker's own account or the account of others;
- (5) "Conservator", a person appointed or qualified by a court to have care and custody of the estate of a disabled or incapacitated person, whether denominated as general, limited or temporary conservator, or a person legally authorized to perform substantially the same functions;
- (6) "Court", the circuit court, including the probate division of the circuit court;
- (7) "Custodial property", all property belonging to a beneficiary in the possession and control of a personal custodian under sections 404.400 to 404.650, and includes the income and proceeds of that property;
- (8) "Donor", a transferor who makes a present or future gift of property to a beneficiary by a transfer under sections 404.400 to 404.650 and includes a person who holds a power of appointment to make a gift of the donor's property in a similar manner;
- (9) "Financial institution", a bank, trust company, savings and loan company or association, or credit union chartered and supervised under state or federal law and legally authorized to do business in this state;
- (10) "Guardian", a person appointed or qualified by a court to have care and custody of the person of an incapacitated person, whether denominated as general, limited or temporary guardian, or a person legally authorized to perform substantially the same functions;
- (11) "Incapacitated person", a person who is wholly or partially unable by reason of any physical or mental condition to receive and evaluate information or to communicate decisions to such an extent that the person lacks ability or capacity to manage his financial resources and is a disabled or incapacitated person as defined in section 475.0101, RSMo;

State Plan TN# 91-53
Supersedes TN# N/A

Effective Date 12-1-1991
Approval Date JAN 21 1992

(12) "Legal representative", a decedent's personal representative, the guardian of a person or the conservator of the estate of a person;

(13) "Member of the beneficiary's family", the beneficiary's spouse, parent, stepparent, grandparent, uncle, aunt, brother, sister, son, daughter, grandson, granddaughter and their descendants, whether of the whole blood or the half blood, or by adoption;

(14) "Person", an individual, corporation, organization, or other legal entity;

(15) "Personal custodian", a person so designated in a manner prescribed in sections 404.400 to 404.650 and includes a substitute personal custodian and successor personal custodian;

(16) "Personal representative", an executor, administrator, successor personal representative or special administrator of a decedent's estate, whether court appointed or qualified, or a person legally authorized to perform substantially the same functions;

(17) "Property", any present or future interest in property, real or personal, tangible or intangible, legal or equitable and includes the income and proceeds of that interest in property;

(18) "State", any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States;

(19) "Transferor", a person who transfers property to a beneficiary under sections 404.400 to 404.650.